United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 27, 2005

TO : Timothy Peck, Acting Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Sutter Solano Medical Center
Cases 20-CA-32188 and 20-CA-32301

Sutter Alta Bates Summit Medical Center
Cases 20-CA-32189 and 20-CA-32300

Sutter Alta Bates Summit Medical Center 593-4042
Cases 20-CA-32226 and 20-CA-32299 593-4056

Caregivers and Healthcare Employees Union
Case 32-CG-53-1

These cases arise out of a one-day sympathy strike conducted by two Unions at two hospitals. They were submitted for advice as to whether: (1) one Union provided timely Section 8(g) notice to one hospital; and (2) we should defer to the parties' grievance arbitration processes Section 8(a)(3) allegations that the hospitals violated the Act when, on the four days following the strike, they did not allow to work employees who were not scheduled to, and who did not, work during the strike.

We agree with the Region that CHEU provided timely 10-day notice satisfying the requirements of Section 8(g). We also conclude that the Section 8(a)(3) charges should be dismissed, absent withdrawal, rather than deferred, as these allegations lack even arguable merit.

FACTS

Alta Bates Summit Medical Center ("Alta Bates") and Sutter Solano Medical Center ("Sutter Solano") are acute care hospitals located in California. At both Alta Bates and Sutter Solano, California Nurses Association (CNA) represents registered nurses' bargaining units; at Alta Bates, Caregivers and Healthcare Employees Union (CHEU) represents a technical employees' unit. Each of these bargaining units is covered by an unexpired collective-bargaining agreement containing "no strike/no lockout" clauses with a limited exception for sympathy strikes in regard to lawful picket lines.

During the afternoon of Friday, November 19, 2004,[1] another union representing other units of employees at Alta Bates and Sutter Solano, Local 250, SEIU, notified each of the hospitals that Local 250, SEIU would engage in a one-day primary strike on December 1.

Later on November 19, at 6 p.m. and 6:02 p.m., CNA faxed notice that it would engage in a one-day sympathy strike on December 1 to the human resources offices at Alta Bates and Sutter Solano. These offices were closed for the weekend when the strike notices were faxed. The next day, Saturday, November 20, at 2:36 p.m., CHEU faxed notice to the closed human resources office at Alta Bates that CHEU would engage in a one-day sympathy strike on December 1. Also on Saturday, November 20, both CNA and CHEU e-mailed Alta Bates' Director of Human Resources, Richard Hinshaw. The e-mail, entitled, "Sympathy Strike Notice CNA and CHEU," stated, "I'm sure you've been expecting these by email. No doubt you got my faxes yesterday . . ." and included the two Unions' ten-day notices as Microsoft Word attachments, entitled "ABSMC 10-day notice" and "Cheu 10-day notice." The e-mail was opened and read by Hinshaw on Sunday, November 21, on a Blackberry personal digital assistant recently provided by Alta Bates; Hinshaw says that he did not open the attachments for fear of losing them, given his unfamiliarity with the new Blackberry.

In a letter to employees dated November 19, Alta Bates stated that it had received strike notice for December 1 from its employees' unions, including CNA and CHEU, and informed employees that, if they did not report to work on December 1, the day of the strike, they would not be allowed to work for the four days following the one-day strike, even if they were not scheduled to work on December 1.

Although the letter is dated before CNA and CHEU strike notices were sent, it would appear that Alta Bates was anticipating receiving such notices. Within days, Sutter Solano sent the same message to its employees. This message was repeated by both hospitals over the next several days in memos, fliers, and posters distributed or displayed in the two hospitals. Employees were not given any deadline by which to inform the hospitals as to whether they would be working on December 1. A flier dated November 23 that was posted at Alta Bates stated that any employee who showed up to work at any point during the 24-hour strike period, even

---

[1] All dates hereinafter are in 2004, unless otherwise noted.

without notice to the hospital, would be allowed to work during the subsequent four days.

The hospitals arranged for replacement employees from a temporary staffing company which required that any replacement employee be employed for five days. At least some of the regular unit employees who were not scheduled to work on December 1, and did not work that day, were not allowed to return to work until December 6. Other employees not scheduled to work on December 1 were allowed to work prior to December 6. The hospitals say that they had no replacements for these shifts and needed the employees to cover their regular shifts. The Region's investigation thus far indicates that the only reason employees were not allowed to work their regularly-scheduled shifts was the contractually-required retention of replacement employees. Further, the Unions have not asserted any contrary claim. The Unions only contend that the charge should be deferred to the parties grievance arbitration process.

On November 30, Alta Bates filed the charge in Case 32-CG-53-1, alleging that CHEU "violated Section 8(g) by failing to provide timely written notice to the Employer prior to engaging in a strike against the Employer."[2] No charge has been filed regarding CNA's strike notice to Sutter Solano.

Between November 30 and January 7, 2005, CNA and CHEU filed several charges against Alta Bates and Sutter Solano alleging, inter alia, that the hospitals violated Section 8(a)(3) and (5) of the Act by refusing to allow employees who were not scheduled to work on December 1, the day of the Unions' sympathy strike, and who did not work that day, to work their regularly scheduled shifts on December 2 through December 5, and by failing to provide CNA and CHEU with an opportunity to bargain about the terms and conditions of employees not scheduled to work on December 1.

These charges only involve those employees who were not scheduled to work on December 1; they do not address employees who were scheduled and did not work that day because of the strike.

---

[2] Alta Bates recently filed a similar charge against CNA. This charge is currently being held in abeyance by Region 32, pending the determination of the instant CG charge, as it raises no new factual or legal issues not presented here.

CNA and CHEU filed grievances over these issues and have requested that the charges in the instant CA cases be deferred to the parties' grievance arbitration procedures. Alta Bates and Sutter Solano also request deferral to arbitration, although Sutter Solano asserts that it is willing to arbitrate the dispute only if the charges in the instant CA cases are not dismissed. The Region submitted the instant CA cases on the question of whether deferral is appropriate, as the statutory question of the adequacy of the Unions' 8(g) notices may be at issue in these cases.

ACTION

We agree with the Region that CHEU provided timely 10-day notice satisfying the requirements of Section 8(g). We conclude that the Section 8(a)(3) charges should be dismissed, absent withdrawal, rather than deferred, as the Unions have not articulated nor pointed to evidence which would establish that these allegations have arguable merit.

CHEU gave Alta Bates 10-days written notice of its December 1 sympathy strike

Section 8(g) of the Act requires that:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention. . .

It is well established that, in computing the 10-day notice period required under Section 8(g), "the Board counts the date of receipt as the first day and the day before the onset of the activity in question as the last."[3] Thus, in the instant cases, notice must have been received by Alta Bates on or before Sunday, November 21 to be timely for a December 1 strike.

We agree with the Region that Alta Bates received written notice on or before November 21. Putting aside the question of whether CHEU's November 20 fax to the closed Alta Bates Human Resources office alone would have been

[3] Retail Clerks Local 727 (Devon Gables Healthcare Center), 244 NLRB 586, 587 (1979).

sufficient to meet the requirements of Section 8(g),[4] we conclude that CHEU met its notice requirement based on its November 20 e-mail to Alta Bates' Director of Human Resources, Richard Hinshaw. It is undisputed that Hinshaw actually received this e-mail, and opened and read it, on November 21, although Hinshaw says that he did not open the attachments for fear of losing them, given his unfamiliarity with the new Blackberry.[5] Even if Hinshaw did not read the attached notices, the contents of the e-mail gave him notice of the Unions' intent to strike, given its title, "Sympathy Strike Notice CNA and CHEU," and with the title of the relevant Microsoft Word attachment, "Cheu 10-day notice." Moreover, the e-mail expressly referred to the faxed notice that had been sent to Hinshaw the previous day and was waiting in Alta Bates' human resources office. Finally, any claim by Alta Bates that it was unaware of the content of the attachments is further undercut by its having sent a letter to employees, dated November 19, stating that it had received strike notice for December 1 from its employees' unions, including CNA and CHEU.[6] Therefore, based on Hinshaw's timely receipt of the e-mailed 10-day notice, we agree with the Region that CHEU met its Section 8(g) notice

---

[4] Cf. Vapor Recovery Systems Company, 133 NLRB 580, 581-583 (1961), enf. denied 311 F.2d 782 (9th Cir. 1962), in which the Board, citing the notice requirement of Section 8(d) of the Act, found that an employer received timely notice when a letter was timely received in the employer's post office box, but not timely collected from the post office box because the employer was closed for a long Thanksgiving Day holiday weekend.

[5] Hinshaw's refusal to open the attachments to the November 20 e-mail does not negate his having actually "received" the Unions' Section 8(g) notices any more than would an employer's refusing to open, or to accept delivery of, required notices sent by mail. Cf. Evans Milling Company, 94 NLRB 1127, 1130 (1951), in which the Board found a contractually-required notice to be timely in circumstances where an employer's secretary refused to accept delivery because the particular individual addressee was absent at the time. Any such conclusion would be even stronger in the instant cases, as Hinshaw was clearly on notice of the attachments' contents.

[6] Thus, while the letter is dated before CNA and CHEU strike notices were in fact sent, it does indicate that Alta Bates was anticipating receiving such notices. Such an expectation further belies any claim that the hospital could not have known what was in the e-mail attachments.

requirement, and that the charge in Case 32-CG-53-1 should be dismissed, absent withdrawal.

The instant CA cases should be dismissed, absent withdrawal

The Region also submitted for advice whether we should defer to the parties' grievance arbitration processes Section 8(a)(3) allegations that the hospitals violated the Act when, on the four days following the strike, they did not allow to work employees who were not scheduled to, and who did not, work during the strike. Under the Board's deferral policy, final determination of the merits of at least arguably meritorious unfair labor practice charges will generally be deferred to a grievance involving the same issue: (1) that can be processed under the grievance/arbitration provisions of the applicable contract;[7] or (2) that the parties have already submitted to grievance arbitration, where there is a likelihood that the parties will resolve the dispute through that mechanism, even if there is not a grievance/arbitration provision of an applicable contract.[8] Where unfair labor practice charges lack even arguable merit, however, they are dismissed, rather than deferred.[9]

We conclude that the charges in the instant 8(a)(3) charges lack even arguable merit. The Unions argue that the hospitals did not have a legitimate and substantial business justification for not allowing employees who were not scheduled to, and who did not, work during the strike to work during the four days following the strike. The Unions further argue that any claimed justification is belied by the hospitals having told employees that they would be allowed to work if they came to work on the day of the strike, even if they did not arrange a scheduled shift, thus indicating that the hospitals would find positions for an undetermined number of employees regardless of whether replacements had been contracted for or not.

The Unions do not dispute, however, that the temporary staffing company required that any replacement employee be

---

[7] See, e.g., Collyer Insulated Wire, 192 NLRB 837 (1971); United Technologies Corp., 268 NLRB 557 (1984).

[8] See, e.g., Dubo Manufacturing Co., 142 NLRB 431 (1963).

[9] See, e.g., New Jersey Bell Telephone Co., 301 NLRB 719 fn. 1 (1991) (once it is concluded that there has been no violation of the Act, it is unnecessary to reach the question of deferral).

employed for five days, and that some employees who were not scheduled to work on December 1, and who did not work that day, were allowed to work prior to December 6 when the hospitals had no replacements for these shifts and needed the employees to cover their regular shifts. Thus, all of the evidence adduced indicates that the only reason employees who were not scheduled to work on December 1 were not allowed to work their subsequent regularly-scheduled shifts was the contractually-required retention of replacement employees. Significantly, the Unions have not asserted any contrary claim and have presented no evidence that would indicate otherwise.[10]

The Board has made it clear that a supplier employer's contractual requirement that strike replacement workers be retained for a specified period of time establishes an employer's legitimate and substantial business justification for failing to reinstate striking employees or otherwise displacing regularly employed employees.[11] In the instant cases, there is no dispute that the temporary staffing company which provided the strike replacement employees required that any replacement employee be employed for five days. Nor is there any evidence or contention that any employee was denied the opportunity to work for any reason other than the contractually-required retention of replacement employees.[12] In fact, all of the evidence is to the contrary – particularly as some employees not scheduled to work on December 1 were allowed to work prior to December

---

[10] If the Unions present any such evidence, or contend that any affected employee was not permitted to work for any other reason than the retention of the replacement employees, the Region should contact the Division of Advice.

[11] See, e.g., Pacific Mutual Door Co., 278 NLRB 854, 856 (1986) (employer lawfully delayed reinstating strikers for 30 days pursuant to contract with company providing strike replacements where 30-day cancellation provision was a necessary condition of employer getting temporary employees from the referring company); Encino-Tarzana Regional Medical Center, 332 NLRB 914 (2000) (given contractual requirement to retain strike replacements, employer lawfully suspended collectively-bargained shift assignment procedure and assigned shifts in favor of junior crossover employees, thus preventing more senior strikers from working shifts to which they would otherwise have been entitled).

[12] [FOIA Exemption 5, Casehandling

.]

6, when the hospitals had no replacements for these shifts and needed the employees to cover their regular shifts. Therefore, as the hospitals' proffered legitimate and substantial business justification is not contradicted in any way,[13] we conclude that no violation is even arguably made out, and the 8(a)(3) allegations in the instant CA charges should be dismissed, rather than deferred.

Accordingly, the Region should dismiss all of the submitted allegations, absent withdrawal.

B.J.K.

[13] The fact that the hospitals may have attempted to entice employees to cross the picket line and work on December 1 by offering them continued employment does not in any way detract from this conclusion. Not only is it unclear that the hospitals would actually have employed employees who were not needed but, even if they had been willing to do so on a voluntary basis, they were not required to, given their legitimate and substantial business justification for not calling in unneeded employees.